



INTERIOR BOARD OF INDIAN APPEALS

J.B. Love v. Aberdeen Area Director, Bureau of Indian Affairs

4 IBIA 74 (06/06/1975)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF J. B. LOVE

v.

AREA DIRECTOR, ABERDEEN AREA OFFICE, ET AL.

IBIA 75-32-A (Supp.)

Decided June 6, 1975

Motions for rehearing and dismissal of appeal.

Denied.

1. Rules of Practice: Appeals: Dismissal

Failure to serve notice of an appeal on an interested party pursuant to 25 CFR 2.36 does not make dismissal mandatory but it may be considered as cause for dismissal by the officer to whom it is made.

APPEARANCES: Marvin J. Sonosky for appellee, Standing Rock Sioux Tribe; and Bormann and Buckmeier for appellant, J. B. Love.

Pursuant to the Stay of Execution of Decision and Order issued by this Board under date of January 15, 1975, interested parties were given 20 days from receipt of said order in which to respond to the combined motions of the Standing Rock Sioux Tribe for rehearing and dismissal of the appeal of J. B. Love.

The combined motions of the Standing Rock Sioux Tribe, hereinafter referred to as Tribe, moved for rehearing and dismissal on the grounds that the Tribe, as a primary party in interest, was not served with notice of the appeal from the Superintendent to the Area Director or from the Area Director to the Commissioner of Indian Affairs as required by 25 CFR 2.4 and 2.33, and the Tribe was not afforded an opportunity to be heard.

The Tribe further moved to dismiss the appeal on the grounds (a) that appellant accepted and agreed to the modification of his permit and thereby waived his right of appeal and (b) that the notice of modification served on the appellant followed the long-established administrative practice under the regulations and has been treated by the appellant and all affected as the notice of modification under the regulations.

25 CFR 2.4 requires the official making the decision to give notice to any Indian or Indian Tribe whose legal rights or privileges are affected thereby. Accordingly, it was not incumbent upon the appellant under the foregoing regulation to serve the Tribe with notice of the action or decision.

25 CFR 2.33, however, requires notice which in pertinent part provides:

(a) Wherever this regulation requires that a copy of a document be served, service shall be made by delivering the copy personally or by sending the document by registered or certified mail, return receipt requested, to the address of record as required in § 2.32. Where a tribe is an interested party, service shall be made on the authorized tribal official or tribal governing body. Notice of a decision is sufficient if mailed by regular mail.

From the record it is quite evident that appellant failed to serve a copy of his appeal to the Area Director on the Standing Rock Sioux Tribe as required by 25 CFR 2.33.

This failure, however, is not considered fatal to appellant's appeal under 25 CFR 2.36 which in pertinent part provides:

An appeal to the Area Director, Commissioner or the Secretary may be subject to summary dismissal by the officer to whom it is made for any of the following causes:

(a) * * *

(b) If the petition or additional statement of reasons in support of the appeal are not received or not served upon the interested parties within the time required.

[1] Accordingly, failure to serve notice of appeal upon an interested party pursuant to 25 CFR 2.36 does not make dismissal mandatory but it may be considered as cause for dismissal by the officer to whom it is made.

We certainly do not sanction or condone appellant's failure to serve the Tribe with notice of his appeal to the Area Director. Accordingly, we are in agreement with the Tribe in its contention that it should have been served with notice of the appeal to the Area Director. However, the record indicates the Tribe was served

with a copy of the appeal to the Commissioner and therefore had notice and ample time in which to oppose appellant's appeal. In short, the Tribe had an opportunity to be heard upon being notified of the appellant's appeal of the Area Director's decision to the Commissioner, Bureau of Indian Affairs. The record indicates the Tribe was notified of the appeal by certified mail, No. 336051, having been accepted for the Tribe by W. Greybull on November 6, 1974. Moreover, the Tribe appears to have been adequately represented in the matter by the Bureau of Indian Affairs at every stage of the appeal.

The issue of whether or not appellant's acceptance of the modification constituted waiver of his appeal has been rendered moot by the passage of time. In any event, any right the appellant had to the lands in question terminated 180 days after September 20, 1974, the date on which he was apprised, through the modification, that his acreage was being reduced. The Board therefore finds no need to consider and pass on the Tribe's contention regarding the foregoing issue regarding waiver.

For the reasons hereinabove set forth no purpose would be served in granting the Tribe's combined motions for rehearing and dismissal of the appeal at this late date as it does not appear that the Tribe would be prejudiced in any substantial manner by the denial. This is evident from the record that the Tribe allocated the disputed acreage to Felix G. Eagle, effective as of November 1, 1974 who thereafter apparently had the continued use thereof to date. As indicated elsewhere herein, any right the appellant may have had to the disputed acreage could not in any event extend beyond 180 days from September 20, 1974 the date on which he was notified through the modification that his acreage under the permit was being reduced. Accordingly, its combined motion for rehearing and dismissal should be denied and the Stay of Execution of Decision, dated January 15, 1975, should be vacated and the Board's Order of January 3, 1975, should be reinstated.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7, issued December 14, 1973, and 43 CFR 4.1(2), the Standing Rock Sioux Tribe's combined motion for a rehearing and dismissal of this appeal is hereby DENIED and the Stay of Execution of Decision of January 15, 1975, is hereby VACATED and the Order of January 3, 1975, is hereby reinstated.

Done at Arlington, Virginia.

//original signed

Alexander H. Wilson
Administrative Judge

I concur:

//original signed

Mitchell J. Sabagh
Administrative Judge